

FUEL RESOURCES DEVELOPMENT CO.

IBLA 81-139

Decided November 9, 1981

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting an application for a right-of-way across public lands, M 41268.

Set aside and referred to the Hearings Division.

1. Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Applications

Where an applicant for a right-of-way filed under the Act of February 25, 1920, as amended, 30 U.S.C. § 185 (1976), for a natural gas pipeline, raises substantial questions concerning the rejection of its proposed route, a decision rejecting this route will be set aside and the matter referred for a hearing.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Rights-of-Way: Act of February 25, 1920
The Bureau of Land Management has authority to determine the route of a pipeline authorized under 30 U.S.C. § 185 (1976), and is required to consider all relevant factors including its impact on proposed WSA's, as well as the cost to the applicant, in selecting any specific route.

APPEARANCES: Timothy J. Flanagan, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Fuel Resources Development Company (Fuelco) appeals from the October 7, 1980, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting right-of-way application M 41268.

On July 20, 1978, appellant filed the application pursuant to the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1976). Appellant sought the right-of-way, to be used in conjunction with a Missouri River crossing, in order to build a natural gas pipeline to connect six capped wells on the south side of the river with appellant's distribution network on the north side.

Appellant's proposal would traverse lands in T. 23 N., Rs. 18 and 19 E., Principal meridian, along the rugged upper reaches of the Missouri River, known as the Missouri Breaks country. The dispute here is not over whether to build a pipeline, but where.

BLM based its rejection on an environmental assessment record (EAR) for the Fuelco Natural Gas Pipeline issued in final form in June 1980 by the Lewistown District Office. The EAR compared appellant's proposed route (alternative 1) with other possible routes (alternatives 2-5) and a no action alternative (6). Of the other possible alternatives, BLM seriously considered only alternative 2, which traverses lands in T. 22 N., R 19 E.; T. 22 N., R. 18 E; and T. 23 N., R. 18 E., Principal meridian, Montana.

The BLM rejection decision stated that appellant's proposal "would adversely impact wildlife habitat and would be close to and potentially impact a historic site." In addition, BLM stated that the pipeline could not cross the proposed Chimney Bend Wilderness Study Area "in a 'nonimpairing' manner." The decision added that other environmentally acceptable routes are available which could meet the nonimpairment criteria found in the interim management guidelines (IMP) for wilderness study areas (WSA's).

On appeal to this Board, Fuelco disputes BLM's interpretation of record, particularly in its consideration of economic feasibility, compatibility with historic or archeological sites, and soil slumping potential of the various alternative routes. Appellant claims that its proposed route would not affect spawning area of the Paddlefish as severely as would BLM's favored proposal and denies that its proposal would affect Dauphin Rapids. Appellant asserts that BLM did not consider public support or anticipated safe operation of the pipeline. Appellant asserts also that BLM misapplied the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 (1976), the IMP, Federal, Court, and IBLA decisions, and the administration's announced energy policies. Appellant maintains that the decision was arbitrary, capricious, an abuse of discretion and requests an evidentiary hearing before an Administrative Law Judge.

[1] Approval of a right-of-way application for a natural gas pipeline is within the discretion of the Secretary of the Interior. Act of February 25, 1920, as amended, 30 U.S.C. § 185(a) (1976). A BLM decision rejecting an application for a right-of-way will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no

sufficient reason to disturb the decision is shown. Lowell Durham, 40 IBLA 209 (1979); Jack M. Vaughan, 25 IBLA 303 (1976). The BLM decision appealed herein does not, itself, analyze the bases for its rejection, but instead refers to the EAR for elaboration. We must, therefore, examine the EAR to see to what extent it supports the conclusion BLM reached.

The EAR raises five major areas of concern: protection of the Paddlefish spawning grounds around Dauphin Rapids, the dangers of soil slumping and erosion, visual impacts, impacts to historic and cultural features, and impairment of WSA's. Relative economic feasibility is only briefly considered.

The fragile soils found in the proposal area are subject to slumping which could cause a pipeline to break. Both alternatives 1 and 2 cross steep, highly erosive areas (EAR 3-2 to 3-5). BLM states that the longer alternative 2 would traverse less steep terrain, although it would cross a major fault zone (EAR 4-1). BLM estimated alternative 1 would produce 77 tons per year sediment discharge and alternative 2 would produce 59 tons per year as opposed to the 300,000 tons per year normal sediment yield for the Missouri River (EAR 4-3 to 4-4). Both alternatives would threaten riverbank stability, but the long term impact on instream turbidity would be minimal. Construction of either alternative would occur during the early fall when the river is low, as opposed to the spring when high runoff dilutes the sediment load.

The EAR states that sediments churned up during construction of the river trench crossing would cause the most serious impacts to aquatic wildlife. Paddlefish spawning areas would probably be covered by sediment to varying degrees during construction, but the EAR notes that it is likely that the high spring runoff would flush Dauphin Rapids free of sediments before the mid-May to mid-July spawning season. (See EAR 3-11, 4-5.) The Paddlefish is the species of greatest concern. Only seven populations are known to exist; the species is subject to a long-term decline, primarily due to habitat alteration (EAR 3-11). These fish migrate upstream to spawn; they broadcast their eggs over silt-free rubble bars.

The BLM decision expressed concern that alternative 1 might also damage an historic site. Presumably, this refers to the prehistoric open occupation site (24 FR 223) of fire altered artifacts, many buried 10 cm. below the surface (EAR 3-12). In the EAR, BLM estimates 95 percent physical destruction of site 24 FR 224 and 55 percent of site 24 FR 223. Site 24 BL 62 would also be affected by construction of alternative 1. The historic Magdall Homestead would be subjected to visual impacts. The BLM alternative 2 would also cross a prehistoric site (24 FR 222) as well as an old army wagon road (24 BL 74).

Another basis for BLM's rejection was the fact that alternative 1 crosses the Chimney Bend WSA (MT 068-245) and the edge of the Erwin Ridge WSA (MT 066-253). Alternative 2, however, crosses the Stafford WSA

(MT 066-250). The entire Chimney Bend WSA and disputed portions of the other two WSA's were dropped from consideration for wilderness status after initial inventory but these determinations have since been appealed to this Board. 45 FR 75589-90 (Nov. 14, 1980). BLM insists that alternative 2 is more susceptible to rehabilitation sufficient to fulfill the IMP guidelines. Appellant insists that its proposed route is superior and asks for a chance to offer the facts to prove it.

The record in this case offers only inconclusive support for the decision of BLM. The record here contains factual questions on (1) rehabilitative potential of soils, (2) extent of danger to aquatic wildlife from sedimentation, (3) location of Paddlefish spawning grounds relative to river crossings and the effect therein of the alternative proposals, and (4) the impact of alternative 1 on cultural and prehistoric sites and the extent to which such impacts are susceptible to mitigation. 1/ While the EAR in the record contains some information on each of these points, we believe that a hearing would be the best way to ascertain all the facts, and opposing interpretations, for the record. William Alexander (On Remand), 28 IBLA 277 (1976). Additionally, to the extent that the parties deem relevant, evidence should be taken on whether the IMP guidelines could be met for either alternative 1 or 2. 2/

1/ We do wish to comment here on one aspect of the EAR, and the decision based thereon, which we find troubling. The EAR, in its discussion of the various alternative impacts on historic and cultural sites, seemed to presuppose that if a project impacted on a site included in or suitable for inclusion in the National Register, and the impact could not be mitigated, then the project could not be permitted. Such is not the case. As the Deputy Solicitor noted in The Extent to Which the National Historic Preservation Act Requires Cultural Resources to be Identified and Considered in the Grant of a Federal Right-of-Way, 87 I.D. 27 (1979), "the NHPA is essentially a procedural, action-enforcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to federal undertakings which may adversely affect such resources." Id. at 29.

This is not to say that the degree of impact upon such a site is not properly considered in selecting among possible alternatives. On the contrary, it is an essential element to be considered in the decisionmaking process. But what is involved is a weighing process, and it is error to proceed on an assumption that adverse impacts on such sites require the rejection of any proposed course of action. It goes without saying, however, that whenever a federally funded or licensed project impacts or is likely to impact such sites, the procedures mandated by the NHPA must be scrupulously followed.

2/ Should the Board eventually affirm BLM's proposed exclusion of the lands involved herein from study as a WSA, the nonimpairment standards would be inapplicable. It is impossible to predict when any such decision might issue. Therefore, it is the responsibility of the parties to determine whether and to what extent evidence should be taken on the ability to rehabilitate either route so as to meet the IMP's nonimpairment standards.

[2] In a supplemental filing received September 28, 1981, Fuelco cited the recent decision in Rocky Mountain Oil & Gas Association (RMOGA) v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980). In this case, Judge Kerr held, inter alia, that application of the wilderness nonimpairment standard to pre-FLPMA leases, so as to prevent exploration and development of those leases, was contrary to the provision of FLPMA. Appellant notes that, while an appeal on other aspects of Judge Kerr's decision has been taken to the Tenth Circuit, the Department has accepted this part of Judge Kerr's ruling. See I.M. 81-325 (Mar. 12, 1981); 46 FR 20607 (Apr. 6, 1981). Therefore, appellant argues that this Board should direct immediate approval of its proposed alternative.

Not only does this conclusion not flow from the premise, the premise, itself, is erroneous. The Government's accession to Judge Kerr's ruling is not a declaration that "anything goes" on a pre-FLPMA lease. Rather, if, and only if, violation of the nonimpairment standards is necessary to fully explore, develop or produce the lease, then such action must be permitted. See generally, The Bureau of Land Management Wilderness Review and Valid Existing Rights, M-36910 (Supp.) (Oct. 5, 1981). Indeed, this is the only manner in which the Department can give life to the RMOGA stricture that where mineral and wilderness values conflict, "compromises must be worked out." Id. at 1344.

Equally flawed is the premise of appellant's argument. Judge Kerr's analysis was grounded on the rights which mineral lessees had acquired in entering into the oil and gas leases involved therein. In effect, he held that rigid application of the nonimpairment standards constituted a unilateral attempt by the Government to limit and circumscribe the rights which it had already granted the lessees. But essential to his conclusions was the fact that rights to explore, develop, and produce from the leasehold were granted to the lessees.

In contradistinction, no lessee has ever been granted the right to unilaterally determine the route of pipelines needed to reach a developed field, nor has any lessee the right to insist that such pipeline follow the route with the smallest economic costs. Cf. Montana Wilderness Association v. United States Forest Service, 496 F. Supp. 880, 889 (D. Mont. 1980). While such costs are, indeed, relevant factors to be considered in determining the feasibility of any specified routing, they are not now, and were not prior to FLPMA, solely determinative of route selection. Moreover, while nonimpairment may have been a significant factor in BLM's decision, it was actually one of many considerations which entered into its determination. In other words, BLM might well have determined that independent of any wilderness nonimpairment considerations the other factors which it analyzed impelled rejection of Fuelco's proposed routing. And, if sufficient justification were provided, this Board would not hesitate to affirm that determination. We are referring this case to the Hearings Division not because BLM's choice is impermissible, but rather to afford Fuelco an opportunity to show that the factual predicates of BLM's decision do not exist. We expressly reject Fuelco's argument that anything in RMOGA requires a blind acceptance of Fuelco's proposed route.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we refer this case to the Hearings Division, Office of Hearings and Appeals, for a hearing before an Administrative Law Judge. 43 CFR 4.415. After the hearing, the Administrative Law Judge will make the initial decision from which any party adversely affected may take an appeal pursuant to 43 CFR 4.1. Appellant Fuelco shall have the burden of showing error in the State Office's decision. Accordingly, the decision below is set aside and the case is referred to the Hearings Division for further proceedings.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

